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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-471

E. R. REID, ET AL., *Petitioners,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA UAW, LOCAL UNION 1093, *Respondent*

BRIEF IN OPPOSITION FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether any substantial question is presented by dismissal of petitioners' suit challenging UAW political expenditures, where both lower courts found that the Union has complied with this Court's *Street* and *Allen* rulings by establishing a system of pro-rata dues rebates to political expenditures objectors.

INTRODUCTION

This case had its genesis in this Court's *Street* and *Allen* decisions (367 U.S. 740 and 373 U.S. 113), holding that objecting employees required to pay union dues under the Railway Labor Act can assert a right to the rebate of the proportion of their payments spent for political purposes. In 1967, twenty-two employees of McDonnell Douglas Corporation filed this suit patterned on *Street* and *Allen*. They asserted that as employees required by the collective bargaining agreement to pay agency shop fees to the UAW, the Union's expenditure of portions thereof for political purposes violates their statutory and constitutional rights. However, by the time of this suit, UAW President Reuther had already publicly announced that in view of *Street* and *Allen* the Union would improve its existing Constitutional provision for political objectors, which then only provided for diversion of a portion of their dues to a non-partisan citizenship organization. In conformity with President Reuther's promise, the bi-annual Convention of the UAW held in 1968, a few months after this suit was filed, formally amended the Union's Constitution to provide for rebates to objectors of the proportion of their dues spent for political purposes. That was the measure specifically suggested by this Court in *Allen* to avoid unnecesary litigation and to vindicate both the dissenters' rights and the union majority's freedom of political action.

Nevertheless, plaintiffs-petitioners have refused in the five years since the UAW provision was adopted to invoke it in any way, although others who have invoked it have received their annual rebates. Instead of applying for their rebates plaintiffs have pressed thei-

suit upon the courts.[1] Accordingly, the District Court and the Court of Appeals have ruled that plaintiffs assert no meritorious claim for judicial relief, at least until they invoke their rebate rights under the UAW Constitution and find them in some way inadequate or unfair. We demonstrate that no substantial question is presented for review, for the UAW holds out to plaintiffs the very rebates this Court in *Street* and *Allen* called a desirable alternative to litigation, vindicating both the union majority's right to undertake political expenditures and the dissenters' right to abstain from supporting such expenditures.

COUNTERSTATEMENT OF THE CASE

This suit was filed on November 16, 1967 for twenty-two employees of McDonnell Douglas Corporation in Tulsa, Oklahoma, challenging political expenditures by the UAW. On a variety of theories, plaintiffs objected to such expenditures made from their monthly agency shop fee payments required by the collective bargaining agreement of all employees. At that time plaintiffs already had an option with respect to portions of their dues allocated for Union political action. Article 16, Section 6, of the UAW Constitution then provided a right to any objector to divert to a non-partisan organization (American Heritage Society) the portion of his monthly dues or agency shop fees normally allocated to "citizenship fund" political uses under Article 16, Sec-

[1] From the beginning, plaintiffs' suit has been financed and managed by the National Right to Work Committee and the National Right to Work Legal Defense and Education Foundation, organizations whose declared goal is abolition of all forms of union-support requirements. See I R 216.

tion 5. (See Pet. A. 18; VR 298).[2] Moreover, the Union had already recognized the necessity to "broaden and improve" that limited provision, so as to meet this Court's decisions in *Machinists* v. *Street,* 367 U.S. 740 (1961) and *Railway Clerks* v. *Allen,* 373 U.S. 113 (1963). As early as 1964, President Walter Reuther made that public promise in the following terms:[3]

> "The Court [in *Allen*] recognized the difficulty of attempting to differentiate political expenditures from those germane to collective bargaining, but it pointed out that the difficulties of judicially administered relief should 'encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy.'
>
> Within our membership of well over a million free men and women from coast to coast we naturally have disagreement concerning the union's political objectives. . . . Whenever we have differences within our union—the normal situation—our policy is to debate the merits freely and fully, and then abide by the will of the majority. There is no reason why this should not be the policy in our political endeavors. Minority groups are entitled to an opportunity to persuade, but after the final vote is taken, we can no longer permit the minority to veto the wishes of the majority in political or economic matters.
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> But, as *Street* and *Allen* make clear, the fact that the majority has a right to act in the political arena does not give them the right to utilize the

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[2] "R" references are to the seven volume record in the Court of Appeals; "Pet. A" refers to the Appendix in the Petition for Certiorari.

[3] W. Reuther "UAW: Past, Present and Future," 50 Virginia Law Review 58, 81-82 (1964).

> minority's funds for ideological purposes offensive to them. Some method must be worked out to reconcile these different interests. The Supreme Court suggested a system of 'contracting out' in the *Allen* case. As already indicated, we long ago adopted such a 'contracting out' system for our citizenship fund, and it will not be a very great step to broaden and improve that system for the future."

The promised improvement to meet this Court's *Street* and *Allen* rulings was formally completed at the 1968 Convention of the UAW, six months after this suit was filed, by amendment of Article 16, Section 6 of the UAW Constitution. The Constitution Committee had recommended that amendment in order to "afford all members the widest possible right of individual democratic dissent," while protecting "the delicate balance of institutional rights and individual rights" (I R 86-87). As the Committee stated (id.):

> "The tradition of the UAW is to afford all members the widest possible right of individual democratic dissent. As to certain matters affecting the interest of the Union as an institution or the basic principles of the labor movement, the decision democratically arrived at by majority vote must control and apply to all. Decisions relating instead to candidates for public office and partisan political matters are different in kind and, therefore, the individual member, as a matter of conscience, should have the right of choice not to be bound by majority will.
>
> . . . we recognize that reasonable men might differ on programs, parties and methods, and because we are fully sensitive to the need for full freedom of conscience and to the delicate balance of institutional rights and individual rights, we propose to provide machinery to permit those few members,

whose conscience so directs them, individually to object to the expenditure of that part of their dues money approximated to be spent for partisan political purposes."

Under the 1968 provision amending Article 16, Section 6, of the Union's Constitution *"any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature"* (Pet. A. 18-19). The annual notification of objection results in rebate payments to the objector representing the proportion of his dues payments expended by the Union for political purposes. That proportion is determined from time to time by a Committee of the UAW International Executive Board. An employee dissatisfied with the portion thus determined has a right of appeal to the International Executive Board, and to the UAW's independent Public Review Board which has been widely praised as a model of union fairness. See *Parks* v. *I.B.E.W.*, 314 F.2d 886, 913 (CA 4, 1963).

Agency shop fee payers are as eligible for rebates as regular Union members (I R 87). Rebate payments have been made to objecting dues payers, and are fully available to the plaintiffs in the present case (Pet. A. 20). Nevertheless, in the five years since the rebate right was incorporated in the UAW Constitution, the present plaintiffs have steadfastly declined to invoke that right (id.).

The availability of rebates under the UAW Constitution was originally before the Tenth Circuit in 1971 but was not reached for disposition. That was an earlier appeal by plaintiffs, challenging the original dismissal of their case on grounds of National Labor

Relations Act pre-emption (Pet. A. 48). The Court of Appeals' former decision reversed that dismissal (Pet. A. 34), finding that the District Court could "conceivably" exercise jurisdiction under the non-pre-empted "fair representation" rule of *Vaca*. As concerned the availability of the UAW rebates, the Tenth Circuit ruled in 1971 that it could not "make any judgment with respect to this issue since it involves factual questions which the District Court has not resolved" (Pet. A.40).

Thereafter, those factual issues were resolved in the findings of the District Court entered in 1972 (Pet. A. 15). The Court found (Pet. A. 18) that the Union Constitution grants any objector a rebate of the portions of his dues spent "for activities or causes primarily political in nature." The Court found (Pet. A. 19) that the provision was adopted both for regular members and for agency shop employees, and is "available to each of the plaintiffs." The Court further found (Pet. A. 20) that although rebates have been furnished to other objectors, none of the plaintiffs has "attempted to utilize the available rebate procedure." The Court further noted (Pet. A.21) that rebates might be available even for the period before 1968 when the new UAW Constitutional provision was originally adopted.

In ruling for the Union the District Court emphasized (Pet. A. 27) that under this Court's *Street* and *Allen* rulings any employee "who specifically objects to the use of a portion of his fees or dues by the union for political candidates, doctrines, and causes with which the employee disagrees, has a right, after specifically informing the union of his objection, to

request and receive a pro-rata rebate." The Court found that governing standard met here because:

> "The Constitution of the International Union provides an adequate, fair, and reasonable procedure which is available to each of these plaintiffs, whereby each can receive the entire pro rata rebate to which he is entitled under *Street,* supra, and *Allen,* supra" (Pet. A. 28).

Accordingly, the Court concluded (Pet. A. 31) that "under *Street,* supra, and *Allen,* supra, no legal wrong has been done plaintiffs until they have been refused an adequate rebate by the Union."

The Court of Appeals affirms the District Court's basic ruling. It notes (Pet. A. 12) that its earlier 1971 opinion had distinguished *Street* and *Allen,* declining to find that the rationale of the Railway Labor Act cases applies under the NLRA. But the Court goes on (id.) to emphasize that in seeking affirmance of the District Court "the Union does not rely on the difference between NLRA and RLA. Instead, it says that in recognition of the RLA cases it has adopted a complying intra-union remedy." On that score the Court finds that compliance with *Street* and *Allen* has been achieved. It points to the availability of the rebate provision both to regular UAW members and agency shop employees, and to the fact that the rebate amount determined by the International Executive Board committee can be appealed by a dissatisfied objector to the Union's independent Public Review Board (id.). The Court concludes (Pet. A. 13) that the UAW provision *"is a good faith effort to comply with the teachings of Street and Allen."*

Concerning plaintiffs' condemnation of the Union remedy under the unfair representation principle, the

Court finds "no concrete particulars" to sustain it, because before they have invoked their rebate rights plaintiffs' objections are merely "conjectures as to how the union remedy might work in imagined circumstances" (Pet. A. 13-14). The Court concludes (id.) that, once the Union "saw the handwriting on the wall and decided that under *Street* and *Allen* some remedy must be made available", the only question is "whether that remedy, on its face negates the unfair representation charge. We believe that it does."

REASONS FOR DENYING THE WRIT

No question of substance is presented here, for the UAW has exactly followed this Court's prescription for dealing with individual objections to union political expenditures. In *Street* and *Allen* this Court struck a balance between the competing rights of the union majority to expend its treasury for political purposes serving the common interest and objecting dues-payers' freedom to abstain from contributing to such expenditures. This Court in *Allen* (373 U. S. at 122-124) urged unions to achieve that balance by providing for fair rebates to dissenters of the proportion of their dues expended for political causes. The Court specifically noted that "difficulties in judicially administered relief" should encourage unions toward "adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." The remedy suggested by this Court was the exoneration of dissenters from a proportion of their required dues, under a union-established "formula for ascertaining the proportion of political expenditures in its budget." The Court urged that course as one of the "more practical alternatives to

litigation for the vindication of the rights and accommodation of interests here involved."

The UAW was the first national union to heed this Court's suggestion by creating a plan by which dissenters are "afforded an internal union remedy." There is nothing to impugn the finding by the courts below that the UAW rebate plan "is a good faith effort to comply with the teachings of *Street* and *Allen*." Indeed, given their available remedy it is even unclear what further issue or claim plaintiffs would have the District Court try in this case, other than their sweeping assertion (Pet. p. 15) that since they are not regular members of the UAW but only agency shop fee payers, exhaustion of union remedies cannot be "binding" upon them.[4]

But that claim misses the point, for the defect in plaintiffs' case goes far beyond failure to exhaust nonjudicial remedies after a wrong has been inflicted. Plaintiffs refuse to exercise a right—not exhaust a remedy. Here no wrong at all has been inflicted on plaintiffs, for the rebate system established by the UAW Constitution protects their right to avoid supporting Union political action. By writing an annual letter to the Secretary-Treasurer of the UAW a dissenter receives his proportional rebate. Under these circumstances, the District Court properly found, and

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[4] Actually, there is no material difference between agency shop and union shop requirements in the area of dues support and expenditures. Even under its union shop clause the UAW requires only financial support payments from the employee (see VR 127), and this Court has found such financial payments to be the maximum compulsion permitted by federal law. *General Motors* v. *NLRB*, 373 U.S. 734, 744 (1962). Moreover, the agency shop contract applicable to plaintiffs when this suit was filed was replaced in 1971 by the usual union shop agreement (VR 126).

the Court of Appeals agrees (Pet. A. 14), that the issue is not merely one of remedies exhaustion but the absence of any legal wrong at all (Pet. A. 31-32):

> "Under *Street,* supra, and *Allen,* supra, no legal wrong has been done plaintiffs until they have been refused an adequate rebate by the Union. Only the refusal of the Union to make an adequate rebate to each plaintiff can be legally challenged in an action based on *Street,* supra, and *Allen,* supra. There is no showing by plaintiffs that they have attempted to or exhausted the UAW rebate procedure, and they have advanced no legally adequate excuse for this failure. . . .
>
> "There can be no legal wrong until an adequate rebate has been refused, and there can be no refusal until the UAW rebate procedure is found inadequate. Thus, plaintiffs' claim of a legal wrong under *Street,* supra, and *Allen,* supra is not properly before this Court until plaintiffs have used the rebate procedure and found it wanting."[5]

Petitioners are equally mistaken in claiming that here a question is presented concerning the applicability to the National Labor Relations Act of the *Street-Allen* principle which this Court recognized under the Railway Labor Act. It is true that, unlike the Ninth Circuit in *Seay* (427 F.2d 996) the 1971 ruling of the

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[5] Petitioners also complain that the UAW rebate system, established some months after their suit was filed in 1967, is a "*post litem motam*" remedy which comes too late. The Court below properly answers that objection by the observation that even if after the Union "saw the handwriting on the wall" it decided to provide the *Street-Allen* remedy, it is no less dispositive of plaintiffs' grievance. Indeed, in *Allen* itself (at pp. 123-124) *after 10 years of litigation between the parties* this Court suggested adoption by the union of a rebate system to avoid further litigation. Here the Union provision was formally adopted only months after this suit was filed and can even secure retroactive rebates to objectors, including plaintiffs herein (see Pet. A. 21).

Tenth Circuit declined to apply the *Street-Allen* rule under the NLRA, instead relegating plaintiffs to recourse under the unfair representation doctrine. However, the Court below emphasizes in its present opinion (Pet. A. 12) that "the Union does not rely on the difference between NLRA and RLA," but instead claims that "in recognition of the RLA cases it has adopted a complying intra-union remedy." The Court goes on to find that the UAW rebate plan is in fact "a good faith effort to comply with the teachings of *Street* and *Allen*." Accordingly, if the applicability of the *Street-Allen* principle to the NLRA may possibly require this Court's review it must await a case in which it is properly presented. Thus, there is also no possible conflict with the Ninth Circuit's ruling in *Seay* or the District of Columbia Circuit's decision in *Marker*. (83 LRRM 3026). Wholly *consistent* with those rulings that *Street* and *Allen* do apply under NLRA, it is the very nub of the decision by the Court below that the UAW rebate system comports with the *Street-Allen* rule.[6]

Finally, there is also no substance to plaintiffs' objection (Pet. pp. 13-14) that the Court below mis-

[6] The question of NLRA application may also prove less needful of ultimate resolution if NLRA unions follow the enlightened lead of the UAW, and it appears that they are beginning to do so. Within the last year, two major international unions affiliated with the AFL-CIO have adopted *Street-Allen* rebate systems.

In October of 1972 the International Executive Board of the American Federation of State, County and Municipal Employees established a committee to study the subject; at the meeting of the Board in July of 1973 its committee's recommendations were adopted, and rebates are now provided annually for expenditures "partisan political or ideological in nature." Similarly, the Executive Council of the International Association of Machinists and Aerospace Workers promulgated a rebate plan on June 28, 1973 covering expenditures "primarily political in nature." See Official Circular No. 669 in "The Machinist" Vol. XXVIII, No. 19.

applied the fair representation rule of this Court's *Vaca* and *Lockridge* decisions. No esoteric problems in application of that rule are here presented, since all that the courts below have held is that UAW's adoption of a *Street-Allen* rebate system negates plaintiffs' unfair representation claim. Surely the Union's adoption of the very system suggested by this Court for the protection of both the majority's and the dissenters' rights is the opposite of the deceit and discrimination contemplated by this Court's *Lockridge* and *Vaca* rulings!

Petitioners' claim that unfair representation inheres in UAW's heeding of this Court's suggestion adds insult to the injury of their futile suit. For its leadership in this area UAW deserves commendation, not condemnation. At the very least it deserves the judgment of the courts below, relegating plaintiffs to the UAW Constitution's rebate guarantee and freeing the Union from this vexatious and unnecessary litigation.

CONCLUSION

It is submitted that the writ should be denied.

Respectfully submitted,

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